**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case Number: HC-MD-CIV-MOT-GEN-2021/00314

In the matter between:

**INGO HASSE** **APPLICANT**

And

**MARIGOLD HOTEL DEVELOPER (PTY) LTD** **FIRST RESPODNENT**
**MARIGOLD HOTELS** **SECOND RESPONDENT**

**Neutral Citation**: *Hasse v Marigold Hotel Developer (Pty) Ltd* (HC-MD-CIV-MOT-GEN-2021/00314) [2022] NAHCMD 506 (27 September 2022)

**Coram:** UEITELE J
**Heard on:** **11 May 2022**
**Delivered:** **27 September 2022**

**Flynote:** Common law – declaratory relief - a declaratory order is a discretionary remedy and will not be granted where the issue before the Court is academic, abstract or hypothetical.

**Summary:** The applicant concluded a sale agreement with the first respondent, then represented by one of the directors, and which agreement was for goods for use in

the business of second respondent. The applicant in another action received judgment against the second respondent for the non-payment in terms of the agreement. In attempt to execute its judgment, the applicant directed the registrar issue a writ of execution, and which writ the deputy-sheriff used to attach the property of the second respondent. The first respondent informed the deputy sheriff that it was the true owner of the property, and which notification resulted in interpleader proceedings by the deputy sheriff. The first respondent then having failed to prove its ownership in the High Court, appealed to the Supreme Court.

The applicant since then brought the present application seeking an order that at all times the first respondent was a director of the second respondent and that furthermore, it was equally liable for the debts of the second respondent, and for this court to grant it leave to execute against the property of the first respondent – in the collection of its summary judgment application, while the appeal in the Supreme Court remains pending.

*Held that*, in the interpleader proceedings the dispute is not so much that the judgment creditor obtained a judgment against an unidentified legal persona, but rather who the owner of the attached goods is.

*Held that*, declaratory relief must be declined, not only in the situation where the issue placed before court is hypothetical, abstract or academic, but also where, although the issue before the High Court relates to an actual dispute, the granting of declaratory relief by the High Court would, as between the same parties, render the issue before the Supreme Court hypothetical, abstract or academic.

The application by the applicant thus disguised as an attempt to execute pending the first respondent’s appeal in the Supreme Court, the application is dismissed with costs.

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**ORDER**

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1) The application is dismissed.

2) The applicant must pay the first respondent's costs of the application.

3) The matter is regarded as finalised and is removed from the roll.

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**JUDGMENT**

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UEITELE J:

Introduction

[1] The applicant in this matter is a certain Mr Ingo Hasse, a businessman who trades under the name of Orbit Data Services in Windhoek. The first respondent, is Marigold Hotel Developer (Pty) Ltd., a private company incorporated in terms of the Companies Act 28 of 2004.[1] The second respondent is Marigold Hotels, a firm doing business in Windhoek. The second respondent is cited in this matter insofar as it might have an interest in it. No relief is sought against the second respondent.

[2] I will for the sake of convenience refer to the applicant as Mr Hasse, the first respondent as Marigold Hotel Developers and to the second respondent as Hotel Marigold. Where I need to refer to the first and second respondents jointly I will refer to them as the respondents.

[3] On 09 August 2021, Mr Hasse by notice of motion, commenced proceedings out of this Court against the respondents seeking a declaratory order to the effect that, as at 30 October 2019, the date when summary judgment was entered against Marigold Hotels under Case No HC-MD-CIV-ACT-CON-2019/02094, Marigold Hotel Developers was the sole owner of Hotel Marigold. Mr Hasse furthermore sought leave to execute against the assets of Marigold Hotel Developers under Case No HC-MD-CIV-ACT-CON-2019/02094, as if judgment was granted against Marigold

[1] Companies Act, 2004 (Act 28 of 2004).

Hotel Developers personally. Mr Hasse furthermore sought the costs of the application and further or alternative relief. Marigold Hotel Developers opposes the application.

Background

[4] The brief background facts are as follows. From the pleadings in this matter, it appears that Marigold Hotel Developers was initially (that is, as from around May 2009) registered under the name of Marigold Investments Two (Pty) Ltd., but pursuant to a resolution taken, on 22 May 2018, by its directors to change the principal business of Marigold Investments Two (Pty) Ltd from "investments, property investments and all business related thereto to hotel developer", it changed its name to Marigold Developer (Pty) Ltd.

[5] On 28 July 2017, while Marigold Hotel Developers was still trading as Marigold Investments Two (Pty) Ltd., Mr Hasse and a certain Ms Qiaoxia Wu (in her capacity as a representative of Hotel Marigold) concluded a sale agreement for goods to be used by the Marigold Hotel Project (I will in this judgment refer to this agreement as the July 2017 agreement). The goods so sold were delivered to Hotel Marigold. After the sale of the goods in terms of the July 2017 agreement, Mr Hasse rendered invoices to Marigold Hotel Developers. Marigold Hotel Developers settled or paid the invoices which Mr Hasse presented to Marigold Hotel Developers, but some of the invoices (totaling an amount of totaled N$1 102 792-83) for goods sold in terms of the July 2017 agreement remain unpaid.

[6] On 06 December 2018, a certain Ingo Hanke the general manager of Hotel Marigold addressed an electronic mail to Mr Hasse in which mail Ingo Hanke admitted being fully aware of the outstanding amount and undertook to settle the outstanding amount by the 10th December 2018. By May 2019, Hotel Marigold had not honoured its undertaking to settle Mr Hasse's invoices in respect of the goods sold in terms of the July 2017 agreement. Mr Hasse accordingly issued summons against Hotel Marigold under case number HC-MD-CIV-ACT-CON-2019/02094, which claim Hotel Marigold defended.

[7] On 30 October 2019, this Court granted summary judgment in favour of Mr Hasse against Hotel Marigold for the payment of N$ 1 102 792-83 plus interest on that amount at the rate of 20% per annum reckoned from 20 December 2018 to date of payment. On 07 November 2019, Mr Hasse caused a warrant of execution to be issued by the Registrar of this court. Pursuant to the warrant of execution issued in favour of Mr Hasse, the acting deputy sheriff for the district of Windhoek filed a return of attachment in respect of certain movable goods which he had attached on 09 December 2019.

[8] Following the attachment of the goods by the deputy sheriff on 09 December 2019, Marigold Hotel Developers on 26 January 2021, caused a letter to be addressed to Mr Hasse's legal practitioner and the deputy sheriff for the district of Windhoek, in which letter Marigold Hotel Developers claim that the goods under attachment is its property and that it (Marigold Hotel Developers) is a different entity from Hotel Marigold. As a result of the letter of 26 January 2021, the deputy sheriff caused interpleader proceedings to be issued under case number HC–INTERP-2021/0069.

[9] In the interpleader application, Marigold Hotel Developers became the claimant and contended that a certain company known as Kingsway Group Holding (Pty) Ltd., (which ceded its rights to Marigold Hotel developers) are the true owners of the goods that were the subject of the attachment by the Deputy Sheriff. This court, per Parker AJ, dismissed the interpleader application on the ground that there was no proof of ownership by the purported claimant Marigold Hotel Developers. Marigold Hotel Developers did not leave matters there, they appealed to the Supreme Court against the judgment dismissing its interpleader claim.

[10] In view of the appeal noted by Marigold Hotel Developers, Mr Hasse instituted these proceedings seeking the orders that I have referred to in the introductory part of this judgment. As I have indicated earlier Marigold Hotel Developers are opposing the application.

The basis of Mr Hasse's application

[11] Mr Hasse's application is grounded in the allegation that shortly after he issued summons (that is, during May 2019) he, through his legal practitioners filed a notice in terms of Rule 42 of the Rules of the High Court of Namibia requesting Hotel Marigold to disclose its owner. Mr Hasse further alleges that on 7 July 2019, Hotel Marigold's legal practitioner addressed a letter to his legal practitioners of record advising that:

> 'Lastly, and in respect of your Notice in terms of Rule 42, we transmit herewith our client's registration document, same which we shall file as called upon in your Notice.'

[12] The legal practitioners of Hotel Marigold did, on 6 August 2019, file the rule 42 Notice disclosing the owner of Hotel Marigold as Marigold Hotel Developer (Pty) Ltd. Based on the disclosure in the rule 42 notice, Mr Hasse contends that Marigold Hotel Developer (Pty) Ltd., was at all relevant times trading under the style and name of Marigold Hotels. He continues and contends that in terms of rule 42, Marigold Hotel Developer (Pty) Ltd., is since 6 August 2019, regarded as a party to that action proceeding with the rights and duties of a defendant.

[13] Mr Hasse furthermore contends that Marigold Hotel Developers never disputed its status as the owner of Hotel Marigold during the action proceedings under case number HC-MD-CIV-ACT-CON-2019/02094. He contends that Marigold Hotel Developers was fully aware of the action proceedings against it and actively participated in those proceedings. He furthermore contends that he had meetings with authorised representatives of Marigold Hotel Developers in an endeavour to settle the dispute and that up to the date when he launched this application, which is the subject matter of this judgment, Marigold Hotel Developers have not denied that it has at all relevant times up to the date when summary judgment was entered into against Marigold Hotels on 30 October 2019, been trading under the name and style of Marigold Hotels. Mr Hasse further contends that Marigold Hotel Developers has in fact disclosed in its letterhead and various other documents produced at the relevant time that it is trading as Marigold Hotels. He attached a few documents to his affidavit to support that contention.

[14] Mr Hasse thus concludes by stating that he has launched the application and seeks the relief that he has set out in this notice of motion in order to avoid any doubt that Marigold Hotel Developers was regarded as a defendant in the action proceedings under case number HC-MD-CIV-ACT-CON-2019/02094 so that effect can be given to the judgment dated 30 October 2019.

The basis on which Marigold Hotel Developers opposes Mr Hasse's application

[15] Marigold Hotel Developers contend that Mr Hasse has not in his founding papers provided evidence that is necessary to satisfy the requirements that are applicable to the grant of the declaratory order or leave to execute that he seeks. Marigold Hotel Developers furthermore contend that the relief which Mr Hasse is seeking is incompetent for the simple reason that the Supreme Court is at present vested with the matter and the grant of either relief will render Marigold Hotel Developer's right of appeal nugatory.

[16] Marigold Hotel Developers contend that its appeal to the Supreme Court concerns the interpleader proceedings between the parties in which proceedings Marigold Hotel Developers, amongst other matters, asserted that, Marigold Hotel Developers is a separate legal entity, distinct from Hotel Marigold and with the ownership of the attached goods being exclusively vested in Marigold Hotel Developers. This is the question upon which the Supreme Court must express itself.

The issue for determination

[17] Having given a brief background to this application, I am of the view that the question that this court is required to answer is whether this court may, in view of the pending appeal against the judgment of this court in the interpleader proceedings, grant the declaratory relief and leave to execute sought by the applicant.

[18] I will now proceed and briefly outline the arguments which were advanced on behalf of the parties in support of their respective claims.

Arguments on behalf of the parties

**[19] Mr Van Vuuren who appeared on behalf of Mr Hasse in summary argued that during May 2019, Mr Hasse caused a notice in terms of rule 42 to be served on Marigold Hotel Developers. In response to that notice, Marigold Hotel Developers' legal practitioners responded recorded that Marigold Hotel Developers was indeed the owner of Hotel Marigold. Mr Van Vuuren furthermore argued that it appears from the plethora of documentation referred to by Mr Hasse that the correct position is that Marigold Hotel Developers trades under the name and style of Marigold Hotels, and that during the action proceedings Marigold Hotel Developers never disputed that the July 2017 agreement was concluded between Mr Hasse and Marigold Hotel Developers. He, relying on the unreported judgment *of Taylor v De Vries and Another,*[2] thus argued that:**

> '… a person who has obtained a judgment against a firm is not without a remedy in those circumstances, for it lies within the inherent power of a court, upon a proper case being made out, to declare an individual to be the proprietor of the firm and thus liable to satisfy the judgment that has been granted against the firm.'

[20] Mr Van Vuuren furthermore argued that, in its answering affidavit in this application Marigold Hotel Developers did not in any manner address the extensive documents referred to by Mr Hasse in his founding affidavit, nor does it properly address the allegations by Mr Hasse regarding the allegations that the Marigold Hotel Developers is the owner of the Hotel Marigold but simply made bald denials that do not disclose any defense.

[21] As regards the appeal noted by Marigold Hotel Developers, Mr van Vuuren argued that the appeal is defective in that the bond of security was delivered on behalf of another entity in non-compliance with the provisions of rule 14 of the Supreme Court Rules. He further submitted that the appeal is defective in that a power of attorney was delivered on behalf of another entity, and not in compliance with rule 7(6) of the Supreme Court Rules. He further argued that, considering

[2] *Taylor v De Vries and another* (CA1/2000) [2000] ZALAC 14 (14 June 2000) para [9].

Marigold Hotel Developers' version placed before the court, Marigold Hotel Developers does not explain how it allegedly became the owner of the goods sold by Mr Hasse. He further argued that the appeal against the judgment of this court is without merit.

[22] Furthermore, Mr Van Vuuren argued that the judgment of 30 October 2019 is not subject to the appeal, and Mr Hasse is thus still free to seek the satisfaction of the judgment. He continued and argued that Mr Hasse is seeking an order to clarify the position of the respondents regarding the judgment that remains unsatisfied. To such end, the applicant is entitled to seek the relief sought in its notice of motion and is not seeking leave to execute against the assets of the Marigold Hotel Developers pending the outcome of the appeal. He argued that the considerations under the appeal are, markedly different to the considerations that this court is required to consider in this application. He concluded by imploring the Court to grant the orders sought.

[23] Mr Namandje who appeared on behalf of Marigold Hotel Developers in summary argued that the applicant's notice in terms of rule 42 does not fully comply with the provision of rule 42 and on that basis the process contemplated under rule 42 has never been and was not perfected, nor does it have any effect to making Marigold Hotel Developers liable to execution in those separate proceedings.

[24] Furthermore, Mr Namandje argued that the declarator, sought by Mr Hasse, is a discretionary remedy. He argued that the court has a wide discretion, including a discretion to refuse to make a declarator upon certain considerations. He submitted that in this matter, the granting of the declarator and the secondary order predicated on the declarator would lead to a situation where a substantial injustice will occur, which is: while Marigold Hotel Developers has an appeal pending in the Supreme Court, its right to have a practical and beneficial appeal will be frustrated and extinguished if this court were to grant the orders sought by Mr Hasse.

Discussion

[25] What is not in dispute in this matter is the fact that Mr Hasse instituted action against Marigold Hotels and obtained judgment against that entity. It is also not in dispute that in order to satisfy the judgment in his favour Mr Hasse caused certain moveable goods to be attached by the Deputy Sheriff, and upon those goods having been attached Marigold Hotel Developers joined the fray and claimed that it is the owner of the goods and that it and Marigold Hotels are two separate juristic persons. Because of Marigold Hotel Developers' claim, the deputy sheriff launched interpleader proceedings.

[26] In the interpleader proceedings this court, on 16 June 2021, ruled that Marigold Hotel Developers did not place sufficient evidence before it and dismissed Marigold Hotel Developers' claim to the attached goods. It is thus clear that in the interpleader proceedings, the dispute is not so much that the judgment creditor obtained a judgment against an unidentified *legal persona*, but rather who the owner of the attached goods is. The *Taylor v De Vries and Another* matter is thus on its facts distinguishable from the present matter.

[27] Mr Hasse in his own words contended that Marigold Hotel Developers appealed against this court's judgment/order delivered on 16 June 2021, in the interpleader proceedings. The '*effect of the appeal is that the execution of my judgment will again be stayed*' says Mr Hasse. It is for that reason that he says he deemed it prudent to act proactively and instituted this application for a declaratory order and based on the declaratory order leave to execute against the property of Marigold Hotel Developers.

[28] I have my doubts about the appropriateness of the procedures adopted by Mr Hasse. What becomes apparent is that Mr Hasse wants to circumvent the appeal lodged (which is directed at determining the ownership of the attached goods) by Marigold Hotel Developers. That he cannot do because if he does that, that will amount to an abuse of the process of court. In the South African case of *Beinash v Wixley* the Court said:[3]

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[3] *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 734F – G.

'What does constitute an abuse of the process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept ''abuse of process''. It can be said in general terms, however, that an abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective. . .'

[29] Rule 121 of this court's rules provides that:

'121. (1) Notice of an appeal to the Supreme Court against a judgment or order of the court must be filed in accordance with the Rules of the Supreme Court.

(2) Where an appeal to the Supreme Court has been noted *the operation and execution of the order in question is suspended pending the decision of such appeal, unless the court which gave the order on the application of a party directs otherwise.*

(3) If the order referred to in subrule (2) is carried into execution by order of the court the party requesting the execution must, before such execution, enter into such security de *restituendo* as the parties may agree or in the absence of an agreement, the registrar may decide, for the restitution of any amount obtained on the execution, which amount includes capital and interest, if so ordered, and taxed costs and the registrar's decision is final.' (Italicised and underlined for emphasis).

[30] It is thus undoubtedly clear that, as a general rule, the execution against the moveable assets claimed by Marigold Hotel Developers and which are attached by the deputy sheriff cannot, in terms of rule 121(2), be carried into effect until the Supreme Court has determined the appeal launched by Marigold Hotel Developers. This much, Mr Hasse recognises because in his affidavit he states that the noting of the appeal means staying execution of his judgment. But that is not entirely correct because the rule, that is rule 121(2) does make provision for a judgment creditor to apply, to the court which gave the order, for leave to execute a judgment pending an appeal with due regard to circumstances set out in rule 121(3). I am therefore of the view that Mr Hasse's application is a disguised application to execute while an appeal is pending against the order of Justice Parker.

[31] In this matter Mr Namandje, relying on the matter of *Mushwena and Others v Government of the Republic of Namibia and Another,*[4] argued that, in view of the pending appeal before the Supreme Court, the Court has a discretion to refuse the relief sought. In view of that argument, I do not find it necessary to decide whether or not Marigold Hotel Developers acknowledged or admitted that it essentially traded as Marigold Hotels. The question whether the appeal pending in the Supreme Court is properly before that court is a matter I cannot adjudicate upon. I can furthermore, not express any view on the prospects of success of the appeal because that is not the matter I am seized with.

[32] Mr Hasse seeks a declaratory order (declaring that, as at 30 October 2019, the date when summary judgment was entered against Marigold Hotels under Case No HC-MD-CIV-ACT-CON-2019/02094, Marigold Hotel Developers was the sole owner of Hotel Marigold), with an order to grant leave to Hasse to execute against Marigold Hotel Developers as if judgment was granted against it. It is settled law that a declaratory order is a discretionary remedy and will not be granted where the issue before the Court is academic, abstract or hypothetical.[5]

[33] I echo the words of Deputy Chief Justice Damaseb and am equally of the view that the legal convictions of the community require that declaratory relief must be declined, not only in the situation where the issue placed before court is hypothetical, abstract or academic, but also where, although the issue before the High Court relates to an actual dispute, the granting of declaratory relief by the High Court would, as between the same parties, render the issue before the Supreme Court hypothetical, abstract or academic. Justice Damaseb,[6] opined that before the High Court declines to grant declaratory relief on that basis, it must be satisfied:

(a) that the parties before the Supreme Court are the same parties before it;

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4 *Mushwena and Others v Government of the Republic of Namibia and Another (2)* 2004 NR 94 (HC).

5 *Ibid* at para [20] and the authorities referred to there.

6 *Ibid* at para [21].

(b) that the issue up for decision in the Supreme Court arises from substantially the same facts as those before the High Court in respect of the declaratory relief sought;

(c) that the granting of declaratory relief by the High Court would have the effect that the Supreme Court decision, when finally handed down, would have no practical effect and would be unenforceable as between the parties before the High Court in respect of the declaratory relief sought.

[34] The consequence of granting a declarator in terms of prayer 1 of the notice of motion without at the same time granting leave to execute against the properties of Marigold Hotel Developers, would be to reduce the judgment of this Court into a mere advisory opinion. Similarly, the consequence of granting both the declarator and the leave sought, thus allowing Mr Hasse to execute the judgment, is to render the judgment of the Supreme Court when handed down, an advisory opinion which would not be enforceable against the parties before it and would thus be *brutum fulmen.*[7] I fully agree with Justice Damaseb that, if the relief sought by Mr Hasse is to be granted *'it would mean that there is no productive purpose to be served by the appeal now before the Supreme Court. The workings of the judiciary would then become a great mystery to the public whose interest it is meant to serve*.'

[35] Having found that Mr Hasse's application is a disguised application to execute while an appeal is pending against the order of Justice Parker, I exercise my discretion not to grant the declarator and the leave sought by Mr Hasse. I do not find any reason why the general rule regarding costs must not apply.

[36] In the result, the court makes the following order;

1) The application is dismissed.

2) The applicant must pay the first respondent's costs of the application.

3) The matter is regarded as finalised and is removed from the roll.

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7 *Ibid* para [22] and the authorities referred to there.

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Judge

APPEARANCES

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| FOR THE APPLICANT: | A Van Vuuren<br>Instructed by Behrens & Pfeiffer,<br>Windhoek |
| FOR THE FIRST RESPONDENT: | S Namandje<br>of Sisa Namandje & Co Inc.,<br>Windhoek |
| FOR THE SECOND RESPONDENT: | No appearance |